

1
2
3
4 **UNITED STATES DISTRICT COURT**
5 **DISTRICT OF NEVADA**

6 * * *

7 TOMMY KIM BAE,

8 Plaintiff,

9 v.

10 STEPHEN WYNN; WYNN RESORTS
11 LIMITED,

12 Defendants.

Case No. 2:14-cv-00150-RFB-NJK

AMENDED ORDER

13 **I. INTRODUCTION**

14 This case is before the Court on a Motion to Dismiss or, in the alternative, Motion for
15 More Definite Statement filed by Defendants Stephen Wynn and Wynn Resorts, Limited. ECF
16 No. 7. Plaintiff Tommy Kim Bae filed a Complaint against Defendants on January 28, 2014,
17 alleging violations of the Foreign Intelligence Surveillance Act (FISA) and the Racketeer
18 Influenced and Corrupt Organizations Act (RICO). ECF No. 1. Because Bae has stated no
19 plausible claim upon which relief can be granted, the Court grants the Motion to Dismiss and
20 gives Bae leave to amend his Complaint. The Court also denies the remaining motions currently
21 pending in this case for the reasons stated below.

22
23 **II. BACKGROUND**

24 The following background is taken from Bae's Complaint. ECF No. 1. Bae states that he
25 was employed by Defendants and that he orally complained to them of acts between December
26 2012 and June 2013 that he believed violated his privacy. Id. ¶ 1. Following this complaint, Bae
27 resigned from his job. Id. After the allegedly invasive acts continued to worsen, Bae sent a
28 written complaint to Defendants via email on August 27, 2013, which he intended to be received

1 by the Board of Directors for Defendant Wynn Resorts. Id. ¶ 2. Bae received no reply and the
2 alleged invasion of his privacy continued. Id. Bae then submitted a report to officer #4408 of
3 “Las Vegas’ FBI Agency” on January 15, 2014, naming specific individuals whom he suspected
4 of violating his privacy. Id. ¶ 3. The next day, Bae received a “Notice of Trespass” from
5 Defendants, although Bae does not provide the contents of this notice or attach it to his
6 Complaint. Id. ¶ 4.

7 Bae alleges that “the fact that [his] privacy at home felt compromised,” combined with
8 the fact that he received a trespass notice immediately after contacting law enforcement
9 regarding Defendants’ allegedly invasive acts, constitute evidence of illegal electronic
10 surveillance. Id. ¶ 5. Bae states that he assumes he was given the notice because Defendants
11 deemed him to be a danger to their assets, and also alleges that Defendants continue to
12 electronically surveil him. Id.

13 Bae’s Complaint appears to state two claims for relief: (1) violation of the electronic
14 surveillance provisions of FISA, for which he seeks actual damages, punitive damages, and fees
15 under 50 U.S.C. § 1810; and (2) violation of the RICO statute (18 U.S.C. § 1962) through acts of
16 invasion of privacy, sexual harassment, credit fraud, stalking, and terrorism or war crimes. Id. at
17 1-2.

18 Defendants move to dismiss, arguing that Bae has improperly claimed that diversity
19 jurisdiction exists in this case and that he has failed to set forth any facts to support a FISA or
20 RICO claim. ECF No. 7 at 3. Defendants also contend that dismissal should be with prejudice
21 because, if allowed to amend his Complaint, Bae would not be able to set forth any plausible
22 facts to support the claims. Id. In the alternative, Defendants request that the Court order Bae to
23 provide a more definite statement of his pleading under Rule 12(e) on the grounds that the claims
24 are so vague that they deny Defendants a meaningful opportunity to respond. Id. at 9-10.

25 26 **III. LEGAL STANDARD**

27 An initial pleading must contain “a short and plain statement of the claim showing that
28 the pleader is entitled to relief.” Fed. R. Civ. P. 8(a). The court may dismiss a complaint for

1 failing to state a claim upon which relief can be granted. Fed. R. Civ. P. 12(b)(6). In ruling on a
2 motion to dismiss, “[a]ll well-pleaded allegations of material fact in the complaint are accepted
3 as true and are construed in the light most favorable to the non-moving party.” Faulkner v. ADT
4 Sec. Servs., Inc., 706 F.3d 1017, 1019 (9th Cir. 2013) (citations omitted). Additionally, the Court
5 must liberally construe the filings of a plaintiff who is proceeding *pro se*, as is the case here.
6 Butler v. Long, 752 F.3d 1177, 1180 (9th Cir. 2014).

7 To survive a motion to dismiss, a complaint need not contain “detailed factual
8 allegations,” but merely asserting “‘labels and conclusions’ or ‘a formulaic recitation of the
9 elements of a cause of action’” is not sufficient. Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009)
10 (quoting Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555 (2007)). In other words, a claim will
11 not be dismissed if it contains “sufficient factual matter, accepted as true, to state a claim to relief
12 that is plausible on its face,” meaning that the court can reasonably infer “that the defendant is
13 liable for the misconduct alleged.” Iqbal, 556 U.S. at 678 (citation and internal quotation marks
14 omitted). In sum, at the motion to dismiss stage, “[t]he issue is not whether a plaintiff will
15 ultimately prevail but whether [he] is entitled to *offer* evidence to support the claims.” Cervantes
16 v. City of San Diego, 5 F.3d 1273, 1274-75 (9th Cir. 1993) (quoting Scheuer v. Rhodes, 416 U.S.
17 232, 236 (1974)) (emphasis in original).

18 “As a general rule, a district court may not consider any material beyond the pleadings in
19 ruling on a Rule 12(b)(6) motion.” Lee v. City of Los Angeles, 250 F.3d 668, 688 (9th Cir. 2001)
20 (citation and internal quotation marks omitted). If the district court relies on materials outside the
21 pleadings submitted by either party to the motion to dismiss, the motion must be treated as a
22 Rule 56 motion for summary judgment. Anderson v. Angelone, 86 F.3d 932, 934 (9th Cir. 1996).
23 Two exceptions to this rule exist. First, the court may consider extrinsic material “properly
24 submitted as part of the complaint,” meaning documents either attached to the complaint or upon
25 which the plaintiff’s complaint necessarily relies and for which authenticity is not in question.
26 Lee, 250 F.3d at 688 (citation omitted). Second, the court “may take judicial notice of matters of
27 public record.” Id. (citation and internal quotation marks omitted).

1 **IV. DISCUSSION**

2 **A. The Court Has Subject Matter Jurisdiction Over This Case**

3 First, Defendants argue that this case should be dismissed for lack of jurisdiction. In the
4 Civil Cover Sheet attached to his Complaint, Bae indicated that diversity of citizenship, rather
5 than federal question, is the basis of jurisdiction in this case. ECF No. 1.

6 District courts have diversity jurisdiction “where the matter in controversy exceeds the
7 sum or value of \$75,000, exclusive of interest and costs, and is between . . . citizens of different
8 states.” 28 U.S.C. § 1332(a)(1). Diversity jurisdiction exists “only if diversity of citizenship
9 among the parties is complete, *i.e.*, only if there is no plaintiff and no defendant who are citizens
10 of the same State.” Wisconsin Dept. of Corr. v. Schacht, 524 U.S. 381, 388 (1998). Here, Bae
11 indicates on his cover sheet that he is a citizen of Nevada. ECF No. 1. He also states that
12 Defendants are citizens of Nevada, other states, and a foreign country. Id. Therefore, on its face,
13 Bae’s Complaint cannot proceed on the basis of diversity jurisdiction.

14 However, district courts have an independent obligation, regardless of the parties’
15 arguments, to address whether subject matter jurisdiction exists. United Investors Life Ins. Co. v.
16 Waddell & Reed Inc., 360 F.3d 960, 966 (9th Cir. 2004). The Court finds that while it does not
17 appear to have jurisdiction on the basis of diversity of citizenship, federal question jurisdiction
18 clearly exists in this case. Under 28 U.S.C. § 1331, district courts have original jurisdiction “of
19 all civil actions arising under the Constitution, laws, or treaties of the United States.” Bae alleges
20 that Defendants invaded his privacy and brings claims under the FISA and RICO statutes, both
21 of which are “laws . . . of the United States.” Id. The Court thus possesses subject matter
22 jurisdiction over this action and will consider the merits of Defendants’ motion.

23 **B. Bae Has Failed to State a Claim for Unlawful Electronic Surveillance**

24 Section 1810 of FISA provides a right of action to any “aggrieved person, other than a
25 foreign power or an agent of a foreign power” who has been subjected to electronic surveillance
26 as defined in the statute, or who has had information about them obtained by electronic
27 surveillance and unlawfully used or disclosed. 50 U.S.C. § 1810. The statute defines an
28 “aggrieved person” as “a person who is the target of an electronic surveillance or any other

1 person whose communications or activities were subject to electronic surveillance.” 50 U.S.C.
 2 § 1801(k). Generally, “electronic surveillance” is defined as the acquisition of wire or radio
 3 communications, or the installation of a surveillance device to monitor and acquire information,
 4 under circumstances in which a person would have a reasonable expectation of privacy.¹ 50
 5 U.S.C. § 1801(f).

6 The Court finds that Bae has not stated a claim for unlawful electronic surveillance under
 7 Section 1810 of FISA. In his Complaint, Bae does not state that he was subjected to electronic
 8 surveillance. Bae does not allege that Defendants acquired any of his radio or wire
 9 communications or that Defendants installed any device to monitor and acquire his information.
 10 In support of his FISA claim, Bae merely states the following: (1) his privacy at home felt
 11 compromised; (2) he received a Notice of Trespass one day after filing a report with law
 12 enforcement; and (3) that he “still show[s]/experience[s] signs of being under ‘electronic
 13 surveillance.’” Compl. ¶ 5. However, these allegations, even when accepted as true and liberally
 14 construed in Bae’s favor in light of his *pro se* status, are not sufficient to allow the Court to
 15 reasonably infer that Defendants have committed unlawful electronic surveillance. Bae’s
 16 allegations that his privacy felt compromised and that he is experiencing signs of being under
 17 electronic surveillance are not specific enough to lead to an inference that Defendants are liable.
 18 Moreover, Bae’s claim that he received a trespass notice immediately after contacting law
 19 enforcement, even combined with the other statements, does not suffice to “raise a right to relief
 20 above the speculative level.” Williams v. Gerber Products Co., 552 F.3d 934, 938 (9th Cir. 2008)
 21 (quoting Twombly, 550 U.S. at 545).

22 Therefore, Bae has failed to state a claim for unlawful electronic surveillance upon which
 23 relief can be granted, and this claim is dismissed. However, Bae shall be given leave to amend
 24 this claim, as will be discussed below.

25 ///

26 ///

27
 28 ¹ Four specific types of acquisitions that constitute electronic surveillance are specifically
 defined in Section 1801(f).

1 **C. Bae Has Failed to State a RICO Claim**

2 Section 1964 of the federal RICO Act provides a private right of action to “[a]ny person
3 injured in his business or property by reason of a violation of section 1962” of the Act. 18 U.S.C.
4 § 1964(c). Section 1962 prohibits “pattern[s] of racketeering activity” conducted by, or for the
5 benefit of, an “enterprise,” as well as any conspiracy to do so. 18 U.S.C. § 1962. In order to
6 establish a civil RICO claim, a plaintiff must allege the following: “(1) conduct (2) of an
7 enterprise (3) through a pattern (4) of racketeering activity (known as ‘predicate acts’) (5)
8 causing injury to plaintiff’s business or property.” United Bhd. of Carpenters & Joiners of Am. v.
9 Bldg. & Constr. Trades Dept., AFL-CIO, 770 F.3d 834, 837 (9th Cir. 2014) (internal quotation
10 marks omitted).

11 The Court finds that Bae has not stated a civil RICO claim. Specifically, Bae has not pled
12 that Defendants constitute an “enterprise” within the meaning of the RICO Act, nor has he
13 plausibly alleged that Defendants engaged in a pattern of racketeering activity.

14 First, “[t]o show the existence of an enterprise under the second element [of a RICO
15 claim], plaintiff[] must plead that the enterprise has (A) a common purpose, (B) a structure or
16 organization, and (C) longevity necessary to accomplish the purpose.” Eclectic Props. East, LLC
17 v. Marcus & Millichap Co., 751 F.3d 990, 997 (9th Cir. 2014). Here, Bae’s Complaint does not
18 contain any factual allegations that show the existence of an enterprise. The Complaint states that
19 Bae’s privacy was invaded and accuses “Stephen Wynn as CEO of Wynn Resort Limited” under
20 the RICO Act. Compl. at 1-2. However, Bae provides no facts regarding the purpose, structure or
21 organization, or longevity of any enterprise.

22 Second, a “pattern of racketeering activity” is defined as at least two acts of racketeering
23 activity. 18 U.S.C. § 1961(5). “Racketeering activity” is defined as any act indictable under one
24 of the criminal offenses listed in the Act. 18 U.S.C. § 1961(1). The Complaint alleges predicate
25 acts of invasion of privacy, sexual harassment, credit fraud, stalking, and terrorism or war
26 crimes. However, Bae has not stated any factual allegations that would support a finding that an
27 enterprise (if one had been established) committed sexual harassment, credit fraud, stalking,
28 terrorism, or war crimes. At most, Bae has attempted to establish a predicate act of invasion of

1 privacy, but even if he had successfully done so, that tort is not a predicate act under RICO. See
 2 18 U.S.C. § 1961(1).

3 Because he has not adequately pled the existence of an enterprise or any predicate acts
 4 that would establish a pattern of racketeering activity, the Court will dismiss Bae's RICO claim
 5 under Rule 12(b)(6) of the Federal Rules of Civil Procedure. Defendants' Motion to Dismiss is
 6 therefore granted and its accompanying Motion for More Definite Statement is denied as moot.
 7 However, Bae will be given leave to amend this claim.

8 **D. Leave to Amend Is Granted and Bae's Remaining Motions Related to His**
 9 **Complaint are Denied Without Prejudice**

10 Although Bae's Complaint fails to state a claim upon which relief can be granted, "[a]
 11 district court should not dismiss a pro se complaint without leave to amend unless it is absolutely
 12 clear that the deficiencies of the complaint could not be cured by amendment." Akhtar v. Mesa,
 13 698 F.3d 1202, 1212 (9th Cir. 2012). In his Complaint and in his response to the Motion to
 14 Dismiss, Bae states that he sent an email to Defendants and a report to an "FBI agency" with
 15 more specific allegations. In deciding this motion, the Court did not consider any material
 16 beyond the pleadings. Therefore, since it appears that there may be more factual allegations that
 17 Bae could plead to survive dismissal, the Court will grant leave to amend.

18 The Court's dismissal of Bae's Complaint without prejudice also renders his remaining
 19 motions moot. These include three Motions to Trial (ECF Nos. 10, 12, and 20), a Motion for
 20 Hearing related to one of the Motions to Trial (ECF No. 21), a Motion for Summary Judgment or
 21 Partial Summary Judgment or, alternatively, Motion for a More Definite Statement (ECF No.
 22 22), a second Motion for Hearing and Request for Judicial Notice related to his Motion for
 23 Summary Judgment (ECF No. 37), and a second Motion for Summary Judgment (ECF No. 40).
 24 These motions are therefore denied as moot.

25 **E. The Parties' Motions for Sanctions Are Denied**

26 The parties have also each filed motions requesting sanctions in this case. Defendants
 27 filed a combined Motion to Strike and Motion for Sanctions against Bae on April 11, 2014. ECF
 28

1 Nos. 26, 27. On April 14, 2014, Bae filed a Motion to Sanction Defendants, including a request
2 for the imposition of criminal sanctions. ECF No. 30.

3 Rule 12(f) of the Federal Rules of Civil Procedure provides that the Court “may strike
4 from a pleading an insufficient defense or any redundant, immaterial, impertinent, or scandalous
5 matter.” The purpose of a motion to strike under Rule 12(f) “is to avoid the expenditure of time
6 and money that must arise from litigating spurious issues by dispensing with those issues prior to
7 trial[.]” Fantasy, Inc. v. Fogerty, 984 F.2d 1524, 1527 (9th Cir. 1993) (internal quotation marks
8 omitted), rev’d on other grounds by Fogerty v. Fantasy, Inc., 510 U.S. 517 (1994).

9 Courts also have the inherent power to impose sanctions, including attorneys’ fees,
10 “when a party has acted in bad faith, vexatiously, wantonly, or for oppressive reasons.”
11 Chambers v. NASCO, Inc., 501 U.S. 32, 45-46 (1991) (internal quotation marks omitted). This
12 inherent power must be used with restraint, however. Id. at 44. Moreover, “[b]efore imposing
13 sanctions under its inherent sanctioning authority, a court must make an explicit finding of bad
14 faith or willful misconduct.” In re Dyer, 322 F.3d 1178, 1196 (9th Cir. 2003). Such a finding
15 requires more than mere negligence or recklessness. Id.

16 The Court denies Defendants’ Motion to Strike. While it appears that Bae may have filed
17 repetitive and unnecessary motions in this case, the Court exercises its discretion to deny these
18 motions as moot in light of its dismissal of the Complaint without prejudice. The Court also
19 denies Defendants’ Motion for Sanctions. The Court does not have sufficient information before
20 it to make a finding of bad faith or willful misconduct, particularly given Bae’s *pro se* status and
21 the fact that these filings occurred before any orders were issued from the Court in this case.

22 The Court also denies Bae’s Motion for Sanctions. In his motion, Bae alleges that
23 Defendants committed perjury by making a false declaration regarding his termination in their
24 Motion to Dismiss. ECF No. 30 at 1. Bae also requests criminal sanctions against Defendants for
25 engaging in electronic surveillance in violation of 50 U.S.C. § 1809 and for perjury and
26 subornation of perjury in violation of 18 U.S.C. § 1621 and § 1622. Id. at 1-2. Bae’s motion does
27 not provide any factual allegations that would support a finding of bad faith or willful
28 misconduct necessary for the imposition of sanctions under the Court’s inherent power. The

1 Court especially declines to issue criminal sanctions, as Bae has not yet even stated a claim for a
 2 RICO violation or established that he, as a private citizen, is authorized to enforce the perjury
 3 statutes. See Cort v. Ash, 422 U.S. 66, 79-80 (1975) (no private right of action to enforce “a bare
 4 criminal statute, with absolutely no indication that civil enforcement of any kind was available to
 5 anyone.”).

6 Although the Court denies the motions for sanctions, Bae is hereby warned that if he files
 7 an Amended Complaint in this case, he should refrain from the excessive and unnecessary filing
 8 of motions. Failure to do so could result in the imposition of sanctions, up to and including the
 9 dismissal of this case.

10 **F. Bae’s Motion for Writ of Mandamus Is Denied**

11 Finally, Bae filed a Motion for Relief and Writ of Mandamus with this Court on January
 12 8, 2015. ECF No. 46. Bae’s motion is made under the Crime Victims’ Rights Act (CVRA),
 13 which states that a crime victim may file a motion seeking relief with the district court for the
 14 district “in which a defendant is being prosecuted for the crime or, if no prosecution is
 15 underway . . . in which the crime occurred.” 18 U.S.C. § 3771(d)(3). In this motion, the crime
 16 victim may assert any of the rights listed in subsection (a), including the right to protection from
 17 the accused and the right to confer with the Government’s attorney in the case. 18 U.S.C.
 18 § 3771(a). If the district court denies the crime victim’s motion for relief, the victim may file a
 19 petition for writ of mandamus in the court of appeals. 18 U.S.C. § 3771(d)(3).

20 The Court denies Bae’s Motion for Relief because Bae has not established that he is a
 21 “crime victim” within the meaning of the CVRA. In relevant part, the statute defines “crime
 22 victim” as “a person directly and proximately harmed as a result of the commission of a Federal
 23 offense[.]” 18 U.S.C. § 3771(e). Here, Bae has provided no evidence that Defendants have
 24 committed a federal offense and has failed to state a claim against Defendants for the federal
 25 causes of action in his Complaint. To the Court’s knowledge, there is no criminal proceeding that
 26 is currently pending or that has been completed against Defendants in relation to Bae’s
 27 allegations. Bae’s allegations of wrongdoing by Defendants, interspersed throughout multiple
 28 briefs and made in a civil case brought under a Complaint that the Court is dismissing in this

1 Order, are insufficient to establish that Defendants have committed a federal offense or that Bae
2 has been directly and proximately harmed as a result. Therefore, the Court denies the requested
3 relief in Bae's motion. Additionally, to the extent that Bae's motion was intended as a Petition
4 for Writ of Mandamus, this Court lacks jurisdiction to consider it and dismisses it on that basis.
5 See 18 U.S.C. § 3771(d)(3) ("If the district court denies the relief sought, the movant *may*
6 *petition the court of appeals* for a writ of mandamus.") (emphasis added).

7
8 **V. CONCLUSION**

9 For the reasons stated above,

10 **IT IS HEREBY ORDERED** that Defendants Stephen Wynn and Wynn Resorts
11 Limited's Motion to Dismiss (ECF No. 7) is GRANTED. Plaintiff Tommy Kim Bae's Complaint
12 is DISMISSED with leave to amend.

13 **IT IS FURTHER ORDERED** that Defendants' Motion for More Definite Statement
14 (ECF No. 8) is DENIED AS MOOT.

15 **IT IS FURTHER ORDERED** that Plaintiff Tommy Kim Bae's Motions to Trial (ECF
16 Nos. 10, 12, and 20) are DENIED AS MOOT.

17 **IT IS FURTHER ORDERED** that Plaintiff's Motion for Hearing (ECF No. 21) is
18 DENIED AS MOOT.

19 **IT IS FURTHER ORDERED** that Plaintiff's Motions for Summary Judgment (ECF
20 Nos. 22 and 40) are DENIED AS MOOT.

21 **IT IS FURTHER ORDERED** that Defendants' Motion to Strike and for Sanctions
22 Against Plaintiff (ECF Nos. 26 and 27) are DENIED.

23 **IT IS FURTHER ORDERED** that Plaintiff's Motion to Sanction and Compel the
24 Defendant and/or Motion to Apply Criminal Sanctions (ECF No. 30) is DENIED.

25 **IT IS FURTHER ORDERED** that Plaintiff's Motion for Hearing and Request for
26 Judicial Notice (ECF No. 37) is DENIED AS MOOT.

27 **IT IS FURTHER ORDERED** that Plaintiff's Motion for Relief and Writ of Mandamus
28 (ECF No. 46) is DENIED.

1 **IT IS FURTHER ORDERED** that Plaintiff shall have **30 days** from the date of this
2 Order to file an Amended Complaint that addresses the deficiencies in his claims identified in
3 this Order. If he does not do so within the time provided, this case will be dismissed with
4 prejudice.

5 **IT IS FURTHER ORDERED** that Plaintiff is warned, if he files an Amended
6 Complaint in this case, to refrain from the unnecessary and repeated filing of similar motions.
7 Failure to comply with this warning may result in the imposition of sanctions, up to and
8 including dismissal of this case.

9
10 DATED this 31st day of March, 2015.

A handwritten signature in black ink, appearing to be 'RFB', written over a horizontal line.

RICHARD F. BOULWARE, II
United States District Judge